BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEGGY I. ULLUM	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,787
DUNHILL STAFFING SYSTEMS, INC.	)	
Respondent	)	
AND	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant, respondent and its insurance carrier all appealed the July 6, 2000 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on November 17, 2000.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared on behalf of claimant. Terry J. Torline of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. The Board also considered the March 15, 2000 deposition of Patricia Doyle.

ISSUES

This is a claim for a series of traumas through September 28, 1998 which resulted in permanent injuries to claimant's bilateral upper extremities. In the Award, Judge Clark found that post-accident, claimant returned to a temporary accommodated part-time job with respondent because she could not perform her regular work due to her injuries. The ALJ further found that although respondent is in the job placement business, respondent could not find claimant a full-time job within her restrictions. Although claimant also looked for work on her own, Judge Clark apparently found that claimant failed to make a good faith effort to find appropriate employment because the Judge found claimant's wage loss to be 0 percent based upon a finding that claimant retained the ability to earn a comparable wage. But, the Judge also found claimant had proven a task loss of 25 percent. Judge Clark found

claimant's functional impairment to be 7 percent, but averaged the 0 percent wage loss with a 25 percent task loss to award claimant a 12.5 percent permanent partial general work disability.

Respondent and its insurance carrier (respondent) contend Judge Clark erred. Respondent argues that claimant should be limited to an award based upon her percentage of functional impairment because she failed to make a good faith effort to find appropriate employment and she retains the ability to earn at least 90 percent of the gross average weekly wage she was earning at the time of her accidental injury. Conversely, claimant argues that she made a good faith effort to find appropriate employment and, therefore, should be awarded a work disability based upon her actual wage loss, which is now 100 percent. In addition, claimant contends that she has proven a 48 percent task loss.

The issues before the Appeals Board on this review concern the nature and extent of claimant's disability, including whether claimant's wage loss should be based upon her actual earnings or if, instead, a wage should be imputed based upon claimant's ability to earn, the percentage of claimant's task loss, and the percentage of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Appeals Board concludes the ALJ's Award should be modified. The Board agrees with the ALJ that claimant has proven that she is entitled to an award based on a work disability, but finds claimant made a good faith effort to find appropriate employment post-accident. Therefore, her wage loss should be based upon her actual post-accident earnings. The Board otherwise adopts the findings and conclusions set forth by the ALJ in his Award only to the extent they are not inconsistent with the findings and conclusions contained herein.

2. Claimant injured her bilateral upper extremities while working for respondent. She was taken off work due to her injury and received medical treatment, including surgery. Before being released with permanent restrictions, claimant last worked in her regular job for respondent on or about September 28, 1998. Therefore, September 28, 1998 is the date of accident for purposes of this award.[1]

3. After receiving 26.57 weeks of temporary total disability compensation while undergoing medical treatment, claimant was found to be at maximum medical improvement and was released with permanent restrictions. At first, respondent was not able or not willing to accommodate those work restrictions, but after receiving encouragement from its insurance carrier to do so, respondent temporarily returned claimant to part-time accommodated work in its office.

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[1] Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

4. Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[2] and Copeland.[3] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute, but in reconciling the principles of Foulk to the new statute, the Court of Appeals in Copeland held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.[4]

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[5]

5. The Kansas Appellate Courts have further interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. The Court has

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[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *See* Gadberry v. R. L. Polk & Co., 25 Kan. App. 2d 800, 802, 975 P.2d 807 (1998).

[5] Copeland at 320.

held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[6] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[7]

6. Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[8] In providing accommodated employment to a worker, Foulk is not applicable where the accommodated job is not genuine[9] or not within the worker's medical restrictions,[10] or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.[11] Even returning to one's regular job will not preclude a work disability where the job is only temporary and not offered in good faith.[12]

7. In this case, claimant was examined by Dr. Pedro A. Murati at her attorney's request on October 25, 1999. He diagnosed (1) right-hand pain, status post right carpal release and curettage and bone graft distal ulnar interosseous ganglion cyst, (2) left carpal tunnel syndrome, (3) bilateral lateral epicondylitis. He recommended permanent restrictions for claimant of no climbing ladders, crawling, or heavy grasping with both upper extremities; occasional repetitive grasp/grab with both upper extremities and frequent hand controls with both upper extremities; no use of hooks or knives; no use of vibratory tools; and limited lift/carry/push/pull to no more than 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly.

Dr. Murati reviewed the task list prepared by Jerry Hardin on November 23, 1999 and found claimant could not perform 22 of 55 tasks identified, for a 40 percent loss. He opined

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[6] *See, e.g.,* Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* ___ Kan. ___ (1999), and Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998).

[7] Cooper v. Mid-America Dairymen, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[8] Niesz v. Bill's Dollar Stores, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[9] Tharp v. Eaton Corp., 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[10] Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[11] Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[12] Gadberry, *supra*; Edwards v. Klein Tools Inc., 25 Kan. App. 2d 879, 974 P.2d 609 (1999).

claimant could not perform 18 of 28, or 64 percent, of the additional tasks identified by claimant after her interview with Jerry Hardin. These combine to an opinion that claimant has lost the ability to perform 40 of the 83 work tasks she performed in jobs during the fifteen-year period preceding the accident. This represents a 48 percent loss.

Using the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Murati rated claimant's functional impairment at 20 percent. He noted that if the bone cyst is taken out of consideration, the combined rating would be 15 percent to the body as a whole, and if the 4 percent for right wrist crepitus were taken out, the overall rating would be 13 percent. Also, it appears Dr. Murati was of the opinion that claimant's preexisting cyst condition was not rateable under the AMA Guides before the aggravation while working for respondent and the resultant surgery.

8. Dr. Philip R. Mills performed a court-ordered examination of claimant on January 31, 2000. His diagnostic impression was (1) status post right carpal tunnel syndrome with surgical release, (2) bilateral, lateral and medial epicondylitis, and (3) interosseous ganglion cyst with iliac bone graft. The first two he attributed to claimant's employment. He said the third may have been aggravated by her work but that the underlying condition was unrelated. He gave claimant restrictions to avoid repetitious or prolonged resisted grip or repetitious flexion/extension and avoid vibratory type tools.

Dr. Mills reviewed the task list prepared by Jerry Hardin and opined that claimant could not perform 4 of the 55 tasks described, for a loss of 7 percent. Dr. Mills believed claimant could perform 45 of the tasks but was not sure or did not give an opinion about 6 tasks on the list. Furthermore, Dr. Mills was not shown the supplemental list of 28 tasks from four jobs not on the original task list. Dr. Mills was asked about some of those jobs in general terms but his testimony is not definite as to which of those jobs, if any, had tasks that claimant could no longer perform within her restrictions. As it is claimant's burden to prove her task loss, these 28 tasks should be added to the 55 that Dr. Mills reviewed. Therefore, Dr. Mills' opinion is that claimant has lost the ability to perform at least 4 out of the 83 total work tasks, or 5 percent.[13]

Dr. Mills rated claimant's functional impairment as 7 percent under the 4th Edition of the AMA Guides, all of which he attributed to claimant's work with respondent. He did not say that claimant had a ratable impairment to either upper extremity under the AMA Guides before her employment with respondent.

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[13] Respondent correctly points out in its brief to the Board that claimant testified to at least one job she performed during the relevant 15-year time period, namely Klepper Oil Company, that was not contained in either task list and not considered by either physician. In certain of its prior decisions, the Board has treated such an omission as a failure of proof and found a 0 percent task loss. However, in an unpublished opinion the Court of Appeals has instructed the Board that this approach may be unwarranted, and that a less harsh remedy may be fashioned. Moreover, in this case, it appears that the omitted jobs duplicate tasks claimant performed in other jobs that are contained in the task lists.

9. Claimant was interviewed by vocational experts Jerry Hardin and Karen Terrill. Mr. Hardin, claimant's expert, believed claimant had the ability to earn $220 per week using Dr. Murati's restrictions. Respondent's vocational expert, Karen Terrill, testified claimant could earn $7-$7.50 per hour doing telemarketing work within Dr. Mills' and Dr. Murati's restrictions.

10. After she was released from treatment and given permanent restrictions, claimant looked for work. She was unsuccessful, however, in finding a full time job that she was qualified to perform and that was also within her restrictions. Although claimant's job search activities may have been temporarily limited by her telling respondent about a month before she was let go that she did not need respondent's help to find other work because she might have something lined up in telemarketing, considering all the circumstances, the Appeals Board concludes claimant did make a good faith job search. The vocational testimony together with claimant's testimony concerning her job search efforts establish that claimant would have difficulty finding work within her restrictions. Furthermore, although respondent casts some doubt on claimant's credibility concerning the extent of her job search, the record as a whole supports a finding of a good faith effort. Many of the job contacts were informal and did not result in an application form being submitted once claimant ascertained that work was not available or could not be performed within her restrictions. It is to be expected that many employers would have no record and no independent recollection of such contacts. Therefore, for purposes of determining claimant's permanent partial general disability, the post-injury wage that claimant was capable of earning after she was released to return to work with permanent restrictions should not be imputed. Because claimant's post-injury wages were not at least 90 percent of the pre-injury average weekly wage, claimant's permanent partial general disability should be based upon a work disability. Because claimant is unemployed, her actual post accident wage is 0 and her wage loss is 100 percent.

11. Although claimant had preexisting restrictions from knee injuries in 1989 and 1994, neither Dr. Murati nor Dr. Mills were asked to decide whether any of the relevant work tasks would have been eliminated by any restrictions or permanent impairment that may have resulted from claimant's previous injuries. But this does not affect the validity of their task loss opinions. The work disability formula provided by K.S.A. 1998 Supp. 44-510e(a) requires consideration be given to all "the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident." When the disability is found to be an aggravation of a preexisting condition, a deduction for any preexisting impairment is to be made pursuant to K.S.A. 1998 Supp. 44-501(c). It provides for a reduction in the disability award "by the amount of functional impairment determined to be preexisting." It is respondent's burden to prove the amount of claimant's preexisting functional impairment, if any.[14] Although claimant's preexisting cyst condition may have

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[14] Hanson v. Logan U.S.D 326, ___ Kan. App.2d ___, 11 P.3d 1184 (2000). *Cf.* Poole v. Earp Meat Co., 242 Kan. 638, Syl. ¶ 1, 750 P.2d 1000 (1988).

contributed to the injury claimant suffered while working for respondent, the credible evidence stops short of proving that claimant had a ratable impairment at the time respondent hired her.

12. Considering both the 48 percent task loss opinion of Dr. Murati and the 5 percent opinion of Dr. Mills, the Board finds that claimant's work disability is 63.5 percent, based upon a 27 percent task loss and a 100 percent wage loss.[15]

In Kansas, the respondent and/or its insurance carrier has the right to select a claimant's treating physician.[16] Neither Dr. Mills nor Dr. Murati treated claimant. Rather, they conducted examinations of claimant at the request of the court and claimant's counsel, respectively. Many factors go into selecting a physician to be an expert witness in a workers compensation case. Obviously, the Judge's or attorney's experience with the physician is a factor. The Board finds both Dr. Mills and Dr. Murati to be credible medical experts and the opinions of both are supported by the record.

The Board is mindful that Dr. Murati considered more of the job tasks claimant performed during the relevant 15 year time period than did Dr. Mills. Accordingly, the Board could find Dr. Murati's task loss opinion to be more reliable than Dr. Mills' and simply adopt the task loss opinion of Dr. Murati. But that approach fails to consider the record as a whole. For example, it would fail to take into account the other differences in the opinions of the medical experts, such as their restrictions.

In this case there is a significant difference of opinion between Dr. Mills and Dr. Murati on what physical abilities claimant retains post-accident as is evidenced by both their restrictions and by their conclusions on what tasks claimant has lost the ability to perform. This becomes evident when the testimony of Dr. Mills and Dr. Murati are compared with respect to the claimant's ability to perform the tasks listed by Mr. Hardin. Although they did not review all of the same tasks, their testimony covers most of the jobs and tasks on Mr. Hardin's list such that a fair comparison can be made. Obviously Dr. Mills believes claimant can still perform many tasks that Dr. Murati says she cannot perform now. The Board finds neither physician's opinion in this regard to be so persuasive or compelling as to cause the Board to adopt one and totally disregard the other. Instead, the Board believes claimant's true abilities lie somewhere between the 48 percent task loss opinion of Dr. Murati and the 5 percent opinion attributed to Dr. Mills. Accordingly, the Board finds claimant's task

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[15] After her release with permanent restrictions, claimant was temporarily employed in a part time job with respondent. Therefore, her wage loss during this time was not 100 percent. But including this part-time wage in the award calculation would not change the amount of benefits. Furthermore, this was not a real job. As in Tharp v. Eaton, 23 Kan. App. 2d 895, 940 P.2d 66 (1997), claimant mostly sat at a desk and did nothing.

[16] K.S.A. 44-510h; Matney v. Matney Chiropractic Clinic, 268 Kan. 336, 995 P.2d 871 (2000).

loss to be 27 percent. Likewise giving some weight to the opinions of both Dr. Murati and Dr. Mills, the Board finds claimant's functional impairment is 10 percent.

AWARD

WHEREFORE, the Appeals Board finds the Award dated July 6, 2000, entered by Administrative Law Judge John D. Clark, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Peggy I. Ullum, and against the respondent, Dunhill Staffing Systems, Inc., and its insurance carrier, Fireman's Fund Insurance Company, for an accidental injury which occurred September 28, 1998 and based upon an average weekly wage of $260.00 for 26.57 weeks of temporary total disability compensation at the rate of $173.34 per week or $4,605.64, followed by 256.18 weeks at the rate of $173.34 per week or $44,406.24, for a 63.5% permanent partial general disability, making a total award of $49,011.88.

As of February 23, 2001, there is due and owing claimant 26.57 weeks of temporary total disability compensation at the rate of $173.34 per week or $4,605.64, followed by 98.86 weeks of permanent partial compensation at the rate of $173.34 per week in the sum of $17,136.39 for a total of $21,742.03, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $27,269.85 is to be paid for 157.32 weeks at the rate of $173.34 per week, until fully paid or further order of the Director.

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully disagrees with the opinion of the majority in the above matter. K.S.A. 1998 Supp. 44-510e obligates that an employee's permanent partial disability include the employee's lost ability to perform work tasks that the employee performed in the 15 years preceding the accident. That opinion must be given "in the opinion of the physician." The Appeals Board has held in the past that, where task loss opinions fail to include tasks from different jobs claimant performed during the relevant 15-year period, those task loss opinions do not satisfy claimant's burden of proving that task loss. Atchinson v. Major, Inc., WCAB Docket No. 225,572 (October 1999) (affirmed by unpublished Court of Appeals opinion Docket No. 84,281, August 4, 2000). *See also* Hildreth v. Rossville Valley Manor, WCAB Docket No. 211,198 (March 1999).

The Appeals Board has further held that there must be an adequate foundation for a physician's task loss opinion and that opinion must necessarily include an adequate description of the individual work tasks. A general description of a worker's job does not suffice. Burk v. Pro Fit Cap Company, Inc., WCAB Docket No. 225,944 (February 1999).

In this instance, neither Dr. Mills nor Dr. Murati were provided a complete list of claimant's prior tasks.

After claimant's initial task list was prepared, that task list was amended by the claimant and the amended list presented to Jerry Hardin, claimant's vocational expert. However, only one task list was presented to the physicians in this matter. Additionally, neither task list contained a complete list of claimant's prior tasks. It is unclear from the record why claimant modified the task list. She appeared to confuse Mr. Hardin as he had asked claimant the same questions at each evaluation with different answers resulting. This cast doubt upon the accuracy of the task list ultimately presented to the physicians in this matter.

In workers compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

This board member would find that claimant has failed to prove the amount of task loss suffered under K.S.A. 1998 Supp. 44-510e and, therefore, no task loss should be awarded in this matter.

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BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Terry J. Torline, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director